In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
MARIA DE LA PAZ VALDEZ DE CONWAY et al. } No. 86.

CUYAMUNGUE GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

On February 21, 1893, Maria de la Paz Valdez de Conway and twenty-one others filed a petition in the Court of Private Land Claims for the confirmation of that certain tract of land known as the Cuyamungue grant

or private land claim situate in the county of Santa Fe, Territory of New Mexico, and alleged to contain in excess of 5,000 acres.

In this petition it was alleged (R., 1–4) that on January 2, 1731, Bernardino de Sena, Tomas de Sena, and Luiz Lopez petitioned Governor Juan Domingo de Bustamente to grant them the surplus land in the abandoned pueblo of Cuyamungue, they having registered it, and describing it as being situate on both sides of the river Tesuque (formerly Cuyamungue), and extending from the bluff of the pueblo of Cuyamungue to the hills of the Nambé road.

That on the same day the said governor made the grant as prayed for, and directed the chief alcalde of the new village of Santa Cruz to notify the adjoining owners and all citizens in the immediate vicinity to show cause, if any they had, why the said tract should not be granted to the petitioners, and having summoned them as directed, and no objection being urged, the said alcalde did, on January 22, 1731, place the petitioners in juridical possession of the lands asked for, describing the boundaries, and after executing his act of juridical possession on the foot of the decree of the governor, returned the same to him, by whom the proceedings were fully approved and placed in the royal archives in the city of Santa Fe, a *testimonio* thereof being delivered to the said grantees, the said original granting decree and act of juridical possession being a part of the archives of the United States now in the custody of the surveyor-general for the Territory of New Mexico.

That the said private land claim was examined, approved, and partially surveyed by said surveyor-general, and by him recommended to Congress for confirmation, but Congress has not confirmed the same.

That the petitioners claim the said tract in severalty and as tenants in common, either by purchase or inheritance from the said original grantees, and that the said grantees and their legal representatives, ever since the making of said grant down to the present time, have been in the exclusive, peaceable, open, uninterrupted, notorious, and rightful possession and enjoyment of said tract, and that no other persons claim the same otherwise than by lease or permission of the petitioners.

After alleging that the grant was complete and perfect at the time of the cession of New Mexico to the United States, the petition closed with other formal allegations and a prayer for confirmation of the grant.

The record discloses no answer on behalf of the United States, although an answer putting in issue generally the allegations of the petition was filed. However this may be, the court was bound to and did consider the case, under the provisions of the third paragraph of section 6 of the act creating the Court of Private Land Claims (26 Stat. L., 854), irrespective of any issue being made up by the filing of an answer on behalf of the Government.

The trial of the cause was had on October 14, 1895 (R., 6), and the plaintiff produced the witnesses Juan Cristobal Romero (R., 7–9 and 11–12) and John Conway (R., 10), her husband; testifying also in her own behalf (R., 10–11). This testimony was to the effect that certain portions of the land claimed had been occupied and

cultivated by persons claiming under the original grantees. The plaintiff offered in evidence the original title papers, consisting of the petition for the grant, the order of the governor making the grant, and the act of the alcalde giving juridical possession (R., 13–17), the genuineness of which documents the United States did not question; also the opinion of the surveyor-general recommending the grant for confirmation (R., 19–20), and the testimony of the witnesses examined before him on this investigation (R., 17–19), describing the boundaries of the grant, and stating that it was and is occupied by parties claiming under the original grantees.

In lieu of numerous mesne conveyances the plaintiff, with the consent of the Government, introduced an abstract of title (R., 12), which, however, appears to have been omitted from the record. This omission, however, is immaterial, as the Government admits that the claimants have shown sufficient interest in the grant to invoke the jurisdiction of the court.

The Government showed that Indians of the pueblos of Nambé and Pojoaque had many years ago instituted proceedings before the surveyor-general of New Mexico under the act of July 22, 1854, for 4 leagues of land each; that the surveyor-general had recommended that the land thus asked for be granted to them, and Congress confirmed a grant to each of said pueblos for 4 square leagues, as recommended (11 Stat. L., p. 374); that the grants to said pueblos were surveyed and patents for them issued, and that the surveys as made cover the larger portion of the land of the old pueblo of Cuya-

munge, which petitioners allege was granted to the original grantees in this case.

The Government introduced in evidence the proceedings had before the surveyor-general in each of these pueblo grants (R., 68–69), the official plats from his office showing the location of the Nambé and Pojoaque grants (R., 20–21), and archives Nos. 882 and 1342 (R., 21–68). These latter archives show the settlement of the Indians in these pueblos, and other orders, to the effect that the Indians be secure in their possession of the lands, and free from molestation and interference in their enjoyment of the same.

It thus fully appears that the larger portion of the land claimed was held and possessed by the Indian pueblos of Pojoaque and Nambé adversely to the plaintiffs and under patents from the United States issued upon Congressional confirmations, under grants from the King of Spain, possibly much older than the title presented (1731). (*See testimony of officials of Pojoaque and Nambé, R., 68–69.*)

However this may be, it does appear that the allegation in the petition (R., 4) that "No person or persons, natural or artificial, are in possession of the said land or any part thereof, or claim the same or any part thereof adversely to your petitioners, or otherwise than by their lease or permission," was not well founded in fact.

It was made to appear on the trial that the Indian pueblos of Pojoaque and Nambé were in possession of and claiming the larger portion under patents from the United States, and otherwise than by the lease or permission of the petitioners (plaintiffs), and that these

adverse claimants, interested in preventing the claim from being established, had not, nor have they to this time, been served with a copy of the petition, as required by the third paragraph of section 6.

To meet the objection raised by the Government that the Indian pueblos of Pojoaque and Nambé were necessary parties to the record, in order that the scheme of the entire act might be made to operate harmoniously and fulfill the express requirements of Congress, that in one action its entire obligations in respect of any particular tract or parcel of land might be forever settled, by providing that "the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands" (sec. 13, subdiv. 5), the court, five days after the trial of the case, without the Indians being represented or having their day in court, on October 19, 1895, with the consent of the parties to the record, ordered that the pueblo of Pojoaque and the pueblo of Nambé be made parties, and that the petition of claimants be deemed amended accordingly (R., 70).

No copy of the petition or amended petition was served upon these pueblos, nor did they appear and waive the service, but the court, on the 24th day of October, 1895, entered a decree against the United States, confirming the entire grant as complete and perfect at the date of the treaty (R., 70–71), but sought to avoid, as the opinions fully disclose, the limitations specifically placed upon its jurisdiction by the second paragraph of section 7, and practically ignoring the principles

announced for its guidance in the sections [6] as to parties [§ 13, subdiv. 5], as to conclusive effect, and [14] as to compensation, where the United States had, through misapprehension or mistake, wrongfully sold or granted the land, or any portion, to some other person, which wrongful disposition to such other person shall remain valid notwithstanding the decree.

On the 9th day of November, 1895, the pueblos of Pojoaque and Nambé, by Capt. John L. Bullis, agent of the United States for the Pueblo Indians, filed a motion in their behalf, stating that the lands claimed by the petitioner, and which were confirmed by the court, were almost entirely within the limits of the lands confirmed by act of Congress to the said pueblos and patented to them by the United States. That, although they were made parties defendant to said petition, they were never served with process and had no opportunity to appear and make defense, and asked the court to vacate the decree and allow them to be heard in opposition to the claim (R., 84). This motion was filed on November 9, 1895. It was, on March 3, 1896, set for argument on the 15th (R., 85), and was not finally disposed of until the 2d day of December, 1896, when it was denied (R., 85).

During the pendency of this motion no report was made by the attorney for the United States, but upon its denial report was promptly submitted; and, at the request of the Indian agent, as well as for its own protection, an appeal was directed by the Attorney-General and duly prayed and allowed, citation was signed, served, and filed with the clerk on January 22, 1897 (R., 85–87).

ARGUMENT.

After careful investigation, counsel on behalf of the Government has been unable to find a single act of Congress, or a single decision of this court under any of the various acts looking to the settlement and adjustment of private land claims, which authorized or permitted the plastering of one confirmation, of whatever kind, upon another for the same land, either by Congress itself or by any tribunal or commission deriving its functions and powers therefrom. If the confirmation in this case is permitted to stand, a large portion of the land having been previously confirmed to the Indians under a special act of Congress, which recognized a Spanish title, there exists a double confirmation of a large portion of the same land, one by Congress itself and the other by a tribunal which looks to Congress as the source of its being, authority, and power.

The avoidance of just such an unhappy outcome is believed to have been one of the main purposes and intents of Congress when it enacted the present act, as well as in its previous private land-claim legislation. It will be the purpose of the Government to attempt a demonstration that the consummation of this evident purpose of Congress is neither impossible nor difficult under the provisions of the act of 1891.

> SEC. 13. That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely:
>
> * * * * *

Fourth. No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority. Act of March 3, 1891 (26 Stat. L., 854).

I.

THE PRACTICE, PROCEDURE, AND PRINCIPLES OF DECISION ARE REQUIRED TO BE THE SAME IN ALL CASES PRESENTED TO THE COURT OF PRIVATE LAND CLAIMS UNDER THE ACT OF MARCH 3, 1891. (26 STAT. L., 854.)

It was contended by the United States, the only party before the court, that if it should hold the grant to be perfect the land covered by the patents to the Indian pueblos of Pojoaque and Nambé should be specifically ascertained and as specifically excepted, as "such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States." (Sec. 8, act 1891.)

Aside from the *California act of 1851* (9 Stat. L., 631), the act of 1891 is the only instance where Congress has committed to the judicial branch of the Government any jurisdiction over complete and perfect titles to private land claims.

The *act of 1824* (4 Stat. L., 52) is evidently the particular act in *pari materia* with and from which Congress adopted the form and phraseology of the present law, and a careful comparison of the two is important at this stage of the litigation, as well as a consideration of the numerous decisions of this court under the same.

It was made to appear to the court that the Indians were in possession of the larger portion of the land and claimed adversely to the petitioners, and, under the sixth and seventh sections of the act (26 Stat. L., 854), were necessary parties defendant. Also that the decree could not be "conclusive of all rights as between the United States and all persons claiming any interest or right in such lands" unless all such persons were before the court by process or voluntary appearance. Five days after the hearing of the cause, the court ordered the Indian pueblos of Pojoaque and Nambé made parties (R., 70), and then proceeded to enter the decree covering their lands without giving them an opportunity to be heard upon any question of law or fact in the case.

The opinion of the majority of the court (R., 72) goes into and decides the question of the Indian title, without their presence or the affording them an opportunity to be heard, and holds the title of Sena and the others associated with him to be the better title, when it may at least be doubted, upon a full and complete hearing, with all adverse claimants in court, whether the Sena title to a large portion of the land can be sustained at all as the better Spanish title to the land which is the subject of this case. The officials of the pueblo of Pojoaque, before the surveyor-general, on June 28, 1856, testified as follows (R., 68):

> Question. Have you any tradition of the length of time the pueblo has been in existence?
>
> Answer. The bell of the church bears date of 1710. The bell was cast for the church.

Question. Has the pueblo been occupied continuously from that date up to the present time by your people?

Answer. It has been so occupied.

This testimony raises the question whether the title of the pueblo of Pojoaque was not better than that confirmed by the court to the Senas; it certainly was much older and was the only one recognized by the political branch of the Government when it confirmed and patented the land to the pueblo, by special act of Congress, under the report of the surveyor-general. The same is true as to pueblo of Nambé. (R., 69).

This testimony was introduced by the Government for the purpose of establishing a foundation for the contention, in case a confirmation should be given the petitioners, and afterwards raised, that the rights of adverse possessors and claimants, not parties to the suit, could not be decreed by the court to be subordinate to those of the petitioners, and that the decree should specifically except from its operation all lands theretofore disposed of by the United States to other persons, whether rightfully or wrongfully.

I.

THE CLAIMANTS OF THE PERFECT TITLE TO THE CUYAMUNGUE LANDS, UNDER SENA AND OTHERS, BY AVAILING THEMSELVES OF THE PERMISSIVE RIGHT TO SUE THE UNITED STATES, DID SO CUM ONERE.

If they had desired to avoid any of the supposedly harsh terms imposed, it was indeed unwise to seek a

qualified and conditional jurisdiction. They should have stood on their title, retaining the right to challenge the grantees of the United States, or, if coerced by them, to successfully defend their perfect rights.

It is insisted that by the act of 1891 Congress intended, and clearly so provided, that when a suit should be filed by anyone claiming lands within the territory ceded to the United States by the treaties of Guadalupe Hidalgo (1848) or the Gadsden Purchase (1853), by virtue of *any* Spanish or Mexican grant (*perfect* or *imperfect*), concession, warrant, or order of survey, and by which suit it is sought to establish an obligation on the part of the United States to recognize and to give full force to the same, under the laws thereof, certain requirements are imposed in the procedure before a decree can be lawfully entered, viz (see also *in pari materia*, sec. 1, act of 1824):

First. The petition should set forth fully the nature of the claim to the land.

Second. Particularly state the date and form of the grant, concession, warrant, or order of survey under which it is claimed.

Third. By whom made.

Fourth. The name or names of any person or persons in possession of or claiming the same or any part thereof otherwise than by the lease or permission of the petitioner.

Fifth. The quantity of the land claimed and the boundaries thereof and where situate, and a map showing the same as near as may be.

Sixth. Whether the same has been confirmed, considered, or acted upon by Congress or the authorities of the United States, or has been submitted to any authorities constituted by law for its adjustment, and, if so, what action has been taken thereon, if any.

Such are the requirements of procedure in order that the court can determine whether it is proper to assume jurisdiction of the subject-matter. If the allegations are sufficient to show on the face of the petition that the claim is one over which it is required to take jurisdiction, the case may proceed, provided the necessary parties are before the court by process or voluntary appearance.

Those who are or should be named in the petition, if any there be, as being "in possession of or claiming the land or any part thereof otherwise than by the lease or permission of the petitioner," and may be designated as possessors or adverse claimants, are necessary party defendants and required, by the third paragraph of section 6, to be served with a copy of the petition and citation in the ordinary legal manner of serving such process in the proper State or Territory, and in like manner on the attorney for the United States.

It would seem, therefore, that, according to section 6 of the act of 1891 (26 Stat. L., 854), the service of process upon adverse possessors and claimants is as mandatory and necessary to the jurisdiction as the service upon the United States. (See also, in *pari materia*, sec. 1 of act of 1824, 4 Stat. L., 52, and *U. S.* v. *Moore*, 12 How., 209.)

With the United States and all adverse possessors, and claimants properly subjected to the jurisdiction of

the court, it shall then proceed to hear the cause on the petition, answers—if any have been filed—and proofs, and render a final decree, *according to the provisions of the act;* but in no case shall a decree be entered otherwise than upon full legal proof and hearing, and the court shall require the petition to be sustained by satisfactory proofs, whether an answer or plea shall have been filed or not. (Sec. 6, act of 1891, 26 Stat. L., 854.)

The case being properly at issue, the court is required, and given full power and authority, to hear and determine all questions arising in the case *relative to the title to the land, the subject of the case,* the extent and boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty, and the laws and ordinances of the government from which it is alleged to have been derived, and *all other questions between the claimants or other parties in the case and the United States.* (See sec. 7, act of 1891, 26 Stat. L., 854; see also *in pari materia,* sec. 2, act 1824, 4 Stat. L., 52.)

It will be noted that under section 2 of the act of 1824 the court is given "authority to hear and determine all questions arising in the cause relative to the *title of the claimants,* the extent, location, and boundaries of the said claim, and all other matters connected therewith fit and proper to be heard and determined, and, by final decree, to settle and determine the question of the *validity of the title* according to the law of nations, etc., * * * and all other questions properly arising between *the claimants and the United States.*"

It is also provided in the same section that an appeal may be prosecuted to the Supreme Court of the United States within one year from the date of the entry of the decree, "the decision of which court shall be final and conclusive between *the parties*, and should no appeal be taken, the judgment or decree of the said district court shall be final and conclusive."

Under these conditions, the conclusive effect of the decree rendered under the acts of 1824 and 1851 is in marked contrast with, and more restricted in scope and bearing than, that to be given to a decree entered under the provisions of the act of 1891, which provides (Sec. 13, subdivision 5, 26 Stat. L., 854), that "the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

It would seem, therefore, that in this latter act a purpose and intent was manifested by Congress that, by the judicial tribunal to which it had delegated the power to adjust the obligations of the United States under its treaties with Mexico, all and every obligation in each case should be so determined and adjusted and forever quieted that the decree might operate as a full acquittance so far as the United States was concerned, as to the land, "*the subject of the case*," not only as to the claimants, but as to all other persons claiming any interest or right in such lands.

If this purpose was proper, the procedure and practice to accomplish it is ample and sufficient to effect the intent entertained by Congress, if followed and strictly

conformed to, thus quieting and forever settling by adjudication all obligations of the United States in respect of all persons, including the plaintiffs, claiming any interest or right in the lands, "*the subject of the case.*" If so, then is suggested the query, which seems to have been totally lost sight of by the Court of Private Land Claims: How can the full acquaintance of the United States as to the particular land in controversy be judicially decreed, so as to effect the declared purpose of Congress, unless all such persons claiming any right or interest therein were given their day in court, and their claims, rights, and titles receive the benefit of a full, complete, and thorough investigation at its hands?

Under the California act of 1851 (9 Stat. L., 631) the practice, procedure, and rules of decision, as well as conclusive effect of decrees rendered thereunder, are radically different from those obtaining under the two acts of 1824 and 1891. No provision exists in that act for making adverse possessors and claimants parties defendant, nor are their interests in any way affected by the decree of the commissioners or district court unless it be in the evidenciary force given the same in the local courts after patent. That act provides (sec. 13, act 1851, 9 Stat. L., 631):

> That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a

copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided further*, That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the Commissioner of the General Land Office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

Section 15 of the *California Act* (9 Stat. L., 631) provides that the final decree of the commissioners or district court or Supreme Court, or any patent issued thereunder, "shall be conclusive between the *United States and the said claimants only*, and shall not affect the interests of third persons."

A comparison of the conclusive effect to be given the decrees of the commissioners and district court under the act of 1851, with that to be given to the decrees under the acts of 1824 and 1891, shows that there existed in the minds of Congress an intention to finally and forever quiet the title to the land, "*the subject of the case*," not only as between the claimants and the United States, but as to all persons having or claiming any interest or right in and to such lands, thereby acquitting the United States of all the obligations they assumed under the

treaty. And this can not be done unless there is given to the practice and procedure which Congress has provided a broad and liberal interpretation.

III.

THE VARIOUS ACTS OF CONGRESS FOR THE SETTLEMENT OF PRIVATE LAND CLAIMS ARE *in pari materia* WITH THE ACT OF 1891, AND ARE PROPER TO BE CONSIDERED IN DETERMINING THE INTENT AND MEANING OF THIS ACT. *Ryan* v. *Carter* (93 U. S., 78).

It is pertinent at this point to suggest that the framing and phraseology of the act of 1891 was intended to remedy the many defects discovered in former acts upon the subject.

Mr. Justice Miller, delivering the opinion of this court in the case of *Botiller* v. *Dominguez* (130 U. S., 238–251), says:

> The wisdom, therefore, of the present act in regard to land claims in California is manifest by a comparison with these earlier statutes, in which Congress undertook to do the same thing which it desired to do in the act of 1851, but failed for want of a clear, satisfactory, and simple mode of doing it, by bringing all parties before a tribunal essentially judicial in its character, whose decisions should be final without further reference to Congress. But to have the benefit of the superiority of the plan of 1851 over former modes of establishing private rights to lands acquired by treaty, the latter statute must be carried out in accordance with the intention found in its provisions.

The consideration of that case clearly disclosed many defects and the unsatisfactory conclusion of the adjustment of private land claims in California, and was doubtless the cause of the long delay in providing an act for quieting such titles in the remainder of the territory acquired under the treaties with Mexico of 1848 and 1853. But the decision in that case, and the evident desire on the part of Congress to forever be relieved of the continual attempts to obtain from it confirmations of large areas of land, many of which were extravagant and others without merit at all—while within the outboundaries of many claims Congress had attempted to dispose of large portions thereof, and often such attempted disposition had resulted in large investments, relying on the faith of the recognition of the possession and claim being lawful, by the United States patenting the same—determined it to create a judicial tribunal whose judgment under the practice, procedure, and principles of decision would forever satisfy the obligations of the United States, in so far as it proposed to delegate that power to such tribunal, in the force to be given to its decrees.

The fruits of such desire, and legislation to that end, are to be found in the act of March 3, 1891, and the hope is indulged that it will be so administered according to the legislative intent and purpose disclosed in its provisions and evidenced by those acts *in pari materia*, that its decrees, when entered, will be such satisfaction as the United States are willing to make of all obligations under the treaties, not only as to the claimants

(petitioners) in the case, but as to "*all* persons claiming any interest or right in such land." This can only be judicially conclusive by requiring the court as a matter of jurisdiction, before it shall pass a valid decree at all, to bring before it by due process all persons, if any there be, "in possession of or claiming the same or any part thereof otherwise than by lease or permission of the petitioner."

At this stage of this litigation it is incumbent upon us to be careful lest the very object of the law shall fail for want of proper enforcement of the provisions of this act.

This may be "an humble case, involving a tract of land of little value," yet an improper or careless administration of the act will lead to complications and results fraught with many dangers, and the undoing of the very purpose and intent of Congress as clearly expressed, to wit, that the decree when entered "shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such land."

The act is clearly one to quiet the title to the lands within the ceded territory, as between the United States and all persons claiming any interest or right in such lands, and the head of the Department of Justice, when the public interest or the rights of any claimant shall require it, shall cause a petition to be filed against the holder or possessor of any claim or land in any of the States or Territories mentioned in the Act, who shall not have voluntarily come in under the provisions of this act to have his claim settled and adjudicated. (*Sec. 8, Act 1891.*)

In section 12 it is also provided:

> That in *any* case where it shall come to the knowledge of the court that minors, married women, or persons *non compos mentis* are interested in any land claim or matter brought before the court, it shall be its duty to appoint a guardian *ad litem* for such persons as in other cases, and if necessary to appoint counsel for the protection of their rights.

This provision was doubtless inserted by Congress in furtherance of the same purpose to effectually dispose of the private land claims under these treaties by the single tribunal and proceedings therein.

It is not uninteresting to note and follow the evolution of this character of legislation and the results.

It will be noted that in all three of the Acts, 1824, 1851, and 1891, claimants under imperfect grants are compelled to seek the jurisdiction provided respectively, or have their claims declared void and right barred—this feature is common to all.

Under the Act of 1824, the Court is given jurisdiction only of imperfect or equitable claims.

In the California Act of 1851 the commission, and the district court on appeal, are given jurisdiction of *any right or title derived from the Spanish or Mexican Government*, and in the case of *Botiller* v. *Dominguez*, *supra*, it was held to include every grade of title or inchoate right claimed, and was compulsory; those who failed to seek the jurisdiction losing all rights to recognition of their claims or property under the treaty.

It was seriously urged in the local courts of California, and sustained by the supreme court of that State, that a

perfect grant under the laws of Mexico "operated to vest in the grantees therein named all the right, title, and interest of the Mexican Government. They vested as much title under the laws of Mexico in the grantee as does a patent from the United States to the patentee under our system of government." And hence, the holders of perfect titles lost nothing by failing to present their claims to the commissioners under the act of 1851, nor did they "forfeit the land described in the grant by failure to present his claim for confirmation * * *, and the title so acquired by the grantee may be asserted by him or his successor in interest in the courts of this country."

The summing up of this contention is that the holder of a perfect grant could successfully challenge the grantee of the United States, although he had not availed himself of the jurisdiction, compulsory in its nature, to challenge the United States in a court of its own creation, or forfeit his lands.

It has been urged also, that provision amounted to confiscation without due process of law, all of which was held otherwise in the opinion of Mr. Justice Miller, *supra*.

When the Act of 1891 was framed and passed, a more liberal provision was inserted, that the holders of titles which were "not already complete and perfect" at the date of the treaty, but which "the claimants would have had a lawful right to make complete and perfect had the territory not been acquired by the United States," were required to invoke the jurisdiction of the Court of Private Land Claims within two years from March 3, 1891, or such titles were to "be deemed and taken, in all courts

and elsewhere, to be abandoned and forever barred." (Sec. 12, Act 1891.)

As to perfect grants, Congress created a permissive jurisdiction *upon terms*, and one which claimants might seek or decline; but if they voluntarily sought it, they did so *cum onere*. (*Section 8, Act 1891.*)

Having done so in this case, the claimant seeks to break down in "a humble case, involving a tract of land of little value," all the practice, procedure, and rules of decision, as well as limitations upon the exercise of jurisdiction, because, forsooth, his title at the date of the treaty was superior to that of the United States, and hence now superior to that of its grantee.

Then why seek the jurisdiction of the Court of Private Land Claims at all; why not stand aloof and go to the local courts and challenge the grantees of the United States?

Or, again, why did he not *coerce* the United States, under the provisions of the third paragraph of section 8, to challenge him? Had he taken either of these latter courses he might have been in a position to stand on the dignity of his title against the world. But there entered into the election to avail himself of the jurisdiction of the Court of Private Land Claims a concealed motive, by which he sought to avoid the real issues or mistook the act itself.

If he refrained from so doing, and was unable to coerce the United States into bringing the suit, he must then determine at his peril whether his grant was perfect or imperfect; and if his judgment were at fault, in any and all contests thereafter he must fail for want of title,

as the same must be "deemed and taken, in all courts and elsewhere, to be abandoned and shall forever be barred." (Sec. 12.)

He can not seek the permissive jurisdiction except upon the terms prescribed, nor can he be permitted to contest the propriety of their enforcement, however onerous they may be, even to the surrender of all his land, and be remitted to the indemnity section (14) of the act.

IV.

IF THE TITLE OF THE CLAIMANTS TO THE CUYAMUNGE LANDS WAS COMPLETE AND PERFECT "AT THE DATE OF THE ACQUISITION OF THE TERRITORY BY THE UNITED STATES," A DECREE OF CONFIRMATION ACTS AFFIRMATIVELY BY GIVING IT AN INTRINSIC EVIDENCIARY VALUE NOT BEFORE POSSESSED; AND, AS TO SUCH LANDS WITHIN THE CLAIM AS HAVE BEEN CONFIRMED AND PATENTED TO THE INDIAN PUEBLOS OF POJOAQUE AND NAMBÉ, IT IS A DOUBLE CONFIRMATION.

The decree does not except from its operation the lands theretofore confirmed and patented to the Indians, as required by section 8 of the act, but there remains to them an open contest with what the lower court was by the act compelled to determine, i. e., that the title confirmed by its decree was superior to any other Spanish or Mexican title, or any right or title that might have been conferred by the United States; and this, too, without an opportunity having been given them to contest the title which the court confirmed.

The opinion of the court goes behind and investigates

and decides against them the title of the Indians, which they have not been given an opportunity to either assert or defend, when the Government made it plain that their title was possibly as old as 1710 (R., 68, 69). This action is of doubtful propriety, even if the Indians were given their day in court, and is surely in no wise permissible without their lawful presence by due process.

The court could not properly hold the Sena grant entitled to confirmation unless, according to the scheme of this act, it found that the asserted title was superior to any other Spanish or Mexican title; and this view is impossible if the Indian title of 1710 to land their "right to which has hitherto been lawfully acted upon and decided by Congress" (sec. 13, par. 4, act of 1891), is valid under the confirmation in 1858. The determination of the question as to the validity of the Indian title has been foreclosed against the powers and jurisdiction of the Court of Private Land Claims, and the disposition of the land "*the subject of the case*" already made by Congress, must, in any event, "remain valid," and the petitioners remitted for relief to the indemnity clause of the act.

It was held in the case of *Landes* v. *Brant* (10 How., 347–370), under the *Act of March 3, 1807* (2 Stat. L., 440), following *Chouteau* v. *Eckhart* (2 How., 345) and *Les Bois* v. *Bramell* (4 How., 449):

> When Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger; nor could a court of justice go behind the first confirmation and ascertain from the facts and title papers which

claimant had the better original title; that if it was allowed, then the first confirmation could be overthrown by the courts, and the action of the political department (in all cases of double confirmation) would have no conclusive force when the courts were resorted to.

It is true that this only applies to imperfect titles, but the limitations imposed by Congress on the jurisdiction of the Court of Private Land Claims, when a perfect claim shall have been filed, show an evident intention on its part to hold good its previous legislative confirmations of any part of the land, as a condition precedent to the recognition of perfect titles in the Court of Private Land Claims.

V.

IT CLEARLY APPEARS, FROM THE RECORD AND THE OPINIONS IN THE CASE, THAT THE POLITICAL BRANCH OF THE GOVERNMENT HAD ACTED UPON THE TITLE TO PART OF THE LANDS LYING WITHIN THE BOUNDARIES OF THIS CLAIM, BY CONFIRMING AND PATENTING THE SAME TO THE INDIAN PUEBLOS OF POJOAQUE AND NAMBÉ, AND THE ENTIRE SCHEME OF THE ACT CLEARLY DISCLOSES A DETERMINATION ON THE PART OF CONGRESS TO HOLD THOSE CONFIRMATIONS GOOD AGAINST ANY PERFECT OR IMPERFECT GRANT THAT MIGHT SEEK THE DECREE OF THE COURT OF PRIVATE LAND CLAIMS, AND IT HAS EFFECTUALLY DONE SO BY SPECIFIC RESERVATIONS AND LIMITATIONS CONTAINED IN THE EIGHTH, THIRTEENTH, AND FOURTEENTH SECTIONS OF THE ACT.

The decree, therefore, neither in language, intendment, nor effect, finds, *as a fact*, that any portion of the land

had received the action of the political branch of the Government, but violates and ignores the specific limitations imposed by the eighth section:

> * * * If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land *only* as such perfect title shall be found to cover, *always excepting any part of such land that shall have been disposed of by the United States.*

(See also sec. 14.)

In the absence of such specific exception, the decree in this case *is double confirmation* of all the land patented to the Indian pueblos of Pojoaque and Nambé that may fall within the outboundaries of this claim, yet the very object and purpose of the provisions of sections 6, 7, 8, and subdivisions 4 and 5 of section 13 will be defeated unless the Indian pueblos of Pojoaque and Nambé are permitted to contest, as codefendants of the United States, every question of law and fact properly arising in the case, and particularly whether the grant to Sena possessed any validity either as a perfect or imperfect title.

The rules of practice and procedure and principles of decision under the eighth section of the act, relating to perfect titles, are the same as in all other claims presented under the provisions of the act, and if the Sena land, or any portion thereof, has been wrongfully confirmed and patented to the Indians, still such disposition must "*remain valid*" and be specifically ascertained and excepted from the operation of the decree (*U. S.* v. *Moore*, 12 How., 209; *U. S.* v. *Castant*, 12 How., 442), and the

petitioners, if they so desire, may obtain in proper manner their recompense for such loss under the indemnity provisions of this act.

(See *U. S.* v. *Davenport's Heirs*, 15 How., 1–8.)

And when claimants of perfect claims seek this permissive jurisdiction, and are given the privilege of suing the United States in its own courts to obtain a confirmation of and patent for their land, as a consideration therefor they must submit to have such confirmation restricted to so much land *only* as the United States have not disposed of, necessarily excluding from the operation of the decree all lands the title to which has been acted upon by the political branch of the Government and confirmed by it to other persons.

If this disposition to other persons has been wrongful, by reason of the fact that the claimants hold a perfect title, or such an imperfect or equitable claim that they would have the right to call upon the United States as trustees to vest them with the legal title, they are entitled to compensation for the lands thus excluded or disposed of at a rate not exceeding $1.25 per acre, as provided in section 14 of the act of 1891. This provision finds its sponsor in the land-scrip section (11) of the act of 1824, and the procedure to obtain this compensation should be in the same manner as that required to obtain land scrip. (See *U. S.* v. *Moore*, 12 How. 209.)

The provisions for compensation by way of land scrip, under the eleventh section of the act of 1824, and money under the fourteenth section of the act of 1891, can not be justified except upon the theory announced at the commencement of this brief, that the political branch of

the Government, in carrying out the obligations of the United States, under its various treaty provisions as to lands, intended that any unlawful disposition made by it subsequent to the treaty should be and "remain valid," and the original rightful owners of such land, so unlawfully disposed of, should receive land scrip under the one act and money under the other, as full compensation for the land of which they were thus unlawfully deprived.

Holders of perfect titles are not compelled to sue the Government, but when, by the grace of the United States, they seek and are afforded the jurisdiction of the Court of Private Land Claims, their claims are susceptible of all the restrictions and limitations with which Congress environed that jurisdiction.

In the case of *Tameling* v. *U. S. Freehold Company* (93 U. S., 644), the court states that it has been repeatedly held by it that the individual rights of property in the territory ceded by Mexico to the United States were not affected by the change of sovereignty or jurisdiction, but were entitled to protection whether the party had the full and absolute ownership of the land or merely an equitable interest. It further says:

> The duty of providing the mode of securing these rights and fulfilling the obligations which the treaty imposed was within the appropriate province of the political department of the Government.
>
> * * * * *
>
> It is obviously not the duty of this court to sit in judgment upon either the recitals of matters of fact by the surveyor-general or his decisions declaring the validity of the grant. They are embodied in

> his report, which was laid before Congress for its consideration and action. * * * Congress acted upon the claim as recommended by the surveyor-general. * * * The confirmation being absolute and unconditional, without any limitations as to quantity, we must regard it as effectual and operative for the entire tract. The objections to the validity of the grant have been earnestly and elaborately pressed upon our attention. This matter was for the consideration of Congress; we deem ourselves concluded by the action of that body. * * * The phraseology of the framer of the act is in our opinion explicit and unequivocal. We have at the present term in *Ryan* v. *Carter* (*ante* 807) recognized and enforced as the settled doctrine of this court that such an act passes the title of the United States as effectually as if it contained in terms a a grant *de novo*, and that the grant may be made by law as well as by patent pursuant to the law.

The language of section 8 of the act of 1891, which provides that there shall be excepted from the decree of confirmation "any part of such land that shall have been disposed of by the United States," when construed in connection with the provision of section 14 that "if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid," is broad enough to include every character of disposition made by Congress or under its authority; had Congress intended such dispositions to be restricted to those made under the public-land laws, under railroad grants, and the like, it

would have specifically defined each and every kind of disposition it had in mind. But, instead, by the use of the general language, "any part of such land that shall have been disposed of by the United States," it included every variety and kind of disposition already made.

There is nothing in the whole act which furnishes any semblance of justification for the narrow construction which the court has, in its majority opinion, sought to place upon this provision. Nor can any precedent for the course of the court be found in the language or construction of the provisions contained in the act of 1824, *in pari materia*.

In concluding the opinion of the court, Mr. Justice Murray says (R., 79):

> This court held at a former term that the provisions of section 14, allowing compensation in certain cases, did not apply where the land claimed in this court under a title from Spain or Mexico had been patented by the United States to another claimant under a Spanish or Mexican grant; that such action by the Government did not amount to a sale or grant by the United States within the meaning of said section. To exclude the land granted to the petitioners in this case, covered by the patents of the pueblos, would amount to a confiscation of the land so excluded.

It is difficult to understand how the exclusion, which Congress has provided as a condition precedent to the acceptance of the permissive right to sue the United States in its tribunal, can amount to a confiscation of the land so excluded, when for this wrongful disposition of the excluded land Congress has provided adequate money

compensation, just as it provided land script under similar conditions in the act of 1824.

Again, the opinion says (R., 79):

> A decree confirming the grant as a complete and perfect one, to the extent of the boundaries called for in the grant, will be entered in this case. When this is done, the manifest intention of Congress will be carried out, and the rights of the pueblos (if any) will not in any way be affected.

Even if the latter part of this observation were true, nevertheless Congress has specifically provided that such lands shall be excluded from the decree, and it is beyond the province of the Court of Private Land Claims to judicially repeal its provisions in this respect.

Again (R., 79):

> The question of the validity of their title under their patents, and the validity of the petitioners' title under a decree of confirmation by this court, can be determined as between the parties themselves by the local tribunals in a proper proceeding instituted for that purpose.

Had it been the intent of Congress to permit the holders of perfect titles to enter the Court of Private Land Claims and secure its decree of confirmation, and to license them unreservedly to use it as a weapon of offense against those who had theretofore obtained from Congress the recognition of their right to the land under the treaty, it was indeed unfortunate to compel a resort to the expensive and cumbersome mode of another litigation in the local courts, and a sad commentary upon Congress' wisdom as to economy in judicial procedure.

Why should holders of perfect titles be permitted access to the jurisdiction of the Court of Private Land Claims, and by not excluding from their decrees of confirmation the land within the outboundaries of their claims which Congress has theretofore disposed of be afforded in the use of that decree an additional means of attacking the title which Congress previously gave, when their complete and perfect title was already sufficient for all purposes?

VI.

THE DECREE OF CONFIRMATION, IN NOT EXCEPTING FROM ITS OPERATION THE LANDS PATENTED TO THE INDIAN PUEBLOS OF POJOAQUE AND NAMBÉ, INTERFERES WITH AND IS AN ATTEMPT TO OVERTHROW A "JUST AND UNEXTINGUISHED INDIAN TITLE OR RIGHT" TO THEIR LANDS AND HOMES.

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place. (Sec. 13, subdiv. 2, act of March 3, 1891, 26 Stat. L., 854.)

Admitting, for the purpose of this point, that the Indian pueblos did not have a *just title* to any land or place in controversy, still they did possess some *right*, however inchoate, and which, beyond question, had existed since 1710, and such inchoate right has been recognized by the political branch of the Government by its confirmation on December 22, 1858 (11 Stats. L., 374), and carried to patent and been claimed thereunder ever since. No contention *arguendo* can justify the decree of confirmation

in this case in violation of the section of the act just quoted.

The court, in the majority opinion, gratuitously assumed the task to write away, if not a just and unextinguished title, at least a *right* of the Indians to their lands and homes, enjoyed and beneficially used by them long before the date of the alleged Sena grant, and recognized by the United States under the treaty, and to do so ignored the limitations and restrictions in the law of its creation.

Ainsa v. *U. S.* (161 U. S., 208).
U. S. v. *Santa Fe* (165 U. S., 675).
U. S. v. *Sandoval* (167 U. S., 278).
Hayes v. *U. S.* (170 U. S., 637).

VII.

THE SAVING OF THE RIGHTS OF ALL CLAIMANTS AND OTHER PERSONS, INTER SESE, PROVIDED IN SECTION 8, PARAGRAPH 2, IN RELATION TO PERFECT TITLES, AND IN SECTION 13, PARAGRAPH 5, AS TO THE CONCLUSIVE EFFECT OF ANY DECREE OF THE COURT IN RELATION THERETO, IN NO WAY MILITATES AGAINST THE CONCLUSIVE EFFECT, INTENDED BY CONGRESS TO BE GIVEN TO DECREES OF CONFIRMATION, THAT THEY SHALL OPERATE AS AN ACQUITTANCE OF ALL OBLIGATION OF THE UNITED STATES UNDER THE TREATY IN RESPECT OF THE PARTICULAR LAND AS TO "ALL PERSONS CLAIMING ANY RIGHT OR INTEREST IN AND TO SUCH LAND."

> If in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such

perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or title in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States, and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby. (Sec. 8, par. 2, Act of 1891.)

No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands. (Sec. 13, par. 5, Act of 1891.)

When Congress provided in section 6 of the act that all adverse claimants and possessors were necessary parties defendant, and in section 7 that it was the duty of the court to hear and determine all questions properly arising in the case "relative to the title of the land, the subject of the case," and required it to decide the same according to the law of nations, the stipulations of the treaty, and the laws and ordinances of the Government from which it is alleged to have been derived, "and all other questions properly arising between the claimants or other parties in the case and the United States," it became necessary, in order that the Government might

be released from its obligations to any and all persons, to determine among them all which had the better title, if any had; and this question had to be first determined also, that it might be ascertained whether or not the Government, in wrongfully disposing of any portion of the lands claimed, had subjected itself, by its consent, to the damages provided in the indemnity clause of the act, and, if so, to what extent and to whom it was liable, not exceeding $1.25 per acre. These inquiries must obviously be made and settled in order that the court may determine when, where, and to whom the United States became obligated, if at all.

As the primary object of the decree to be rendered is to discharge the United States from its obligations under the treaty, all matters of estoppel and claims *inter sese*, which may come up before or be decided by the Court of Private Land Claims shall not, therefore, be made the subject of pleas in other and different tribunals; nor will those who have interests in privity with the claimants be concluded in any way, by the finding of the Court of Private Land Claims, from asserting their right to participate in the benefits of the confirmation, if, in the local courts, they can show sufficient facts to hold the court's confirmee as trustee for their benefit.

Nevertheless, the saving of these rights *inter sese* must be subjected to the restrictions and limitations to which the Court of Private Land Claims, in its entire jurisdiction, is subordinated in the entering of its decree, viz:

First. If the grant shall be found to be the better grant, and yet imperfect, and the United States has sold or granted or otherwise disposed of any portion of the

land lying within the outboundaries, the Government, at the time of such disposition being the holder of the legal title, having transferred it to some one other than the claimant in the Court of Private Land Claims, that transfer must of necessity remain valid, for the legal title has passed out of the Government to its confirmee, and it retains nothing which is capable of being vested in the claimant before the Court of Private Land Claims.

Second. If the grant in question be found a perfect grant, and the United States has sold or granted or otherwise disposed of any portion of the land lying within its outboundaries, nevertheless, as a condition precedent to the acceptance of the invitation to invoke the jurisdiction of this special tribunal, the claimant of such perfect title has submitted to having that wrongful disposition remain valid and excepted from the operation of his decree of confirmation.

Hence these saving clauses *inter sese* in no way vitiate the force of the contention, originally made, that all dispositions previously made by the political branch of the Government, whether rightful or wrongful, shall not be open to attack or criticism in the local courts by reason of any decree of confirmation rendered by the Court of Private Land Claims. And the observation which has been made as to the concluding portion of the majority opinion in this case may here be repeated, that the attempt has been made to plaster the confirmation of what it assumes to be a perfect grant upon a long prior disposition by Congress of the same land, and which the very act itself says shall be exempt from the influence of the decree.

Ordinarily, a general reservation that no land sold, granted, or disposed of by the United States shall be affected by the decree would cover the exception required by the act, in order that the decree of confirmation may not be used against the Government's older grantee in case of the confirmation of a perfect title. But Congress has gone even further than this, and has provided that the specific land and the particular parties to whom it has been confirmed must be ascertained, so that it may be excepted from the decree and identified without further difficulty.

If, as is disclosed in the decree and stated in the majority opinion of the court, the specific exception of the land disposed of by the United States is not made, and resort remains to the local court for determination of this question, it is true that the consequences may amount to little in this case. Still, in many others involving larger and more valuable grants, ejectments will be brought in the local courts, and, however they may be determined there, this question and these suits will all be brought back to this court, on writs of error or appeal, for a construction of the act of the Court of Private Land Claims, and, particularly that part thereof which provides for the exclusion from its decree, when the grant shall be confirmed as complete and perfect, of any portion of the same land that shall have been disposed of by the United States to other parties. This is one outcome that Congress sought to avoid when it framed and enacted this act, that the decrees of the Court of Private Land Claims should not be used against its own prior

confirmees in controversies in the local courts over litigious titles.

VIII.

The suggestion of counsel that this appeal is not in time, and that the Government has no concrete interest in the case, comes with little grace in the light of the record's disclosures. The Indians were never parties to the suit by due process, and no judgment can be conclusive as against the United States as to "all persons claiming any interest or right in such land," until the provisions of sections 6 and 7 of the act have been complied with by bringing properly into court all adverse possessors and claimants.

Although this is "an humble case, involving a tract of land of little value," it is submitted that the construction which the majority opinion of the court places upon the act of 1891 warrants the Government in its appeal for the benefit of itself and the Indians of Pojoaque and Nambé, that the decision rendered may not be used hereafter as a precedent in other cases involving like issues but larger interests and greater values.

It is submitted that the case should be reversed and remanded, with directions to the Court of Private Land Claims to make the Indian pueblos, as well as all other claimants and possessors, parties defendant, and to proceed to hear and determine all "questions properly arising between the claimants or other parties in the case and the United States," and if it shall decide that the grant in question is a complete and perfect one, the same

shall be confirmed, with the exception of the land which has heretofore been disposed of by the United States to the Indian pueblos of Pojoaque and Nambé by the act of Congress of December 22, 1858.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.
MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.